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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ARIEL ABITTAN,

Case No. 5:20-CV-09340-NC

PLAINTIFF,

V.

LILY CHAO (A/K/A TIFFANY CHEN, A/K/A YUTING CHEN), DAMIEN DING (A/K/A DAMIEN LEUNG, A/K/A TAO DING), TEMUJIN LABS INC. (A DELAWARE CORPORATION), AND TEMUJIN LABS INC. (A CAYMAN CORPORATION).

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR
EXTENSION OF TIME AND
PLAINTIFF'S REQUEST FOR STATUS
CONFERENCE**

Date: November 10, 2021
Time: 1:00 p.m.
Place: Courtroom 5, 4th Floor
Judge: Hon. Nathanael Cousins

DEFENDANTS.

24 || and

NOMINAL DEFENDANT.

EIAN LABS INC.,

NOM

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR EXTENSION OF TIME AND
PLAINTIFF'S REQUEST FOR STATUS CONFERENCE| CASE NO. 5:20-CV-09340-NC

1 Plaintiff, Ariel Abittan, responds to clarify the record, correct inaccuracies in Defendants' 2 Motion for Extension of Time ("Motion"), explain Plaintiff's position on the motion, and request 3 a status conference with the Court to resolve outstanding procedural matters. In support, Plaintiff 4 will address six issues.

5 First, Plaintiff's counsel believes that, upon substitution, new counsel are entitled to 6 extensions of time to familiarize themselves with the record, address scheduling matters, and 7 respond to substantive motions. Accordingly, Plaintiff's counsel conferred in good faith with 8 Defendants' new counsel. While conferring, Defendants' counsel raised the reasonable point that 9 it would be premature, for example, to agree to a discovery plan while they are coming up to speed 10 and while Plaintiff's Motion for Alternative Service [ECF No. 83] remains pending. Plaintiff's 11 counsel, therefore, stipulated to a continuation of the case management conference. [ECF No. 89].¹ 12 Plaintiff's counsel has also agreed to an extension of time for Defendants to respond to the Motion 13 for Alternative Service. *See* Economides Declaration, attached hereto, at **Exhibit A**. Although 14 Defendants' efforts to avoid service of process have caused needless delay, Plaintiff's counsel 15 understands that Defendants' new counsel requires time to assess the procedural and substantive 16 issues raised in the Motion for Alternative Service.²

17 Second, as to the response time for Temujin Labs, Inc. (Cayman) ("Temujin Cayman"), 18 Defendants incorrectly state that "Plaintiff's counsel refused to grant Defendants the requested 19 extension and instead offered only two weeks of additional time *and on the condition that* 20 *Defendants waive service[.]*" Motion ¶ 6 (emphasis in original). The condition was limited to 21 Temujin Cayman; it did not include Defendants Chao or Ding. And the condition was **not** that 22

23 ¹ Although a full case management conference is likely premature, Plaintiff, as elaborated below, 24 respectfully requests a short status conference to discuss the outstanding issues raised in 25 Defendants' Motion and herein.

26 ² At the time Defendants were filing the stipulation to extend the case management conference, 27 Plaintiff's counsel did not agree to include language regarding the extension for responding to the 28 Motion for Alternative Service. Plaintiff's counsel wanted to ensure that an agreement was also 29 reached regarding procedural issues in the state case. Nonetheless, the parties have agreed to a 30 proposed extension for the Motion for Alternative Service, and Plaintiffs' counsel believes that 31 Defendants are preparing and plan to file a stipulation. *See* Economides Decl., Exhibit A.

1 Temujin Cayman “waive” service—*i.e.*, waive the requirement that Temujin Cayman receive the
 2 summons and complaint via a method specified by Rule 4(f). *See* FRCP Rule 4(d) (describing
 3 procedures for waiving service). Plaintiff has validly served Temujin Cayman under Rule 4(f). *See*
 4 [ECF No. 81]. Specifically—and as explained in detail to Defendants’ counsel (*see* Economides
 5 Decl., Ex. A)—Plaintiff served Temujin Cayman on July 7, 2021, by using the Central Authority
 6 in the Cayman Islands pursuant to the Hague Service Convention. *See* [ECF No. 81]. In challenging
 7 prior service attempts, Temujin Cayman had repeatedly argued that service must occur via that
 8 precise method. *See* [ECF No. 53 at 5, 10-11]; [ECF No. 72 at 6]. And Plaintiff incurred the costs
 9 and delays of obliging.

10 Plaintiff’s counsel, therefore, believes that the service issues as to Temujin Cayman have
 11 finally been put to rest. Accordingly, Plaintiffs’ counsel asked Defendants’ counsel to waive
 12 arguments that service was insufficient, **not to waive the right to receive service**. *See* Economides
 13 Decl., Ex. A (“I’ve asked that—given our service through the Hague Central Authority—you agree
 14 not to challenge service of process. I believe that any such challenge would be frivolous, and I don’t
 15 want to waste more time on this issue. If you refuse that condition, you are effectively stating that
 16 you want additional time only to then challenge the very type of service that your client repeatedly
 17 demanded and ultimately received.”).

18 Third, after challenging service attempts, demanding service via the Cayman Islands
 19 Central Authority, and receiving that service on July 7, 2021, Temujin Cayman did not respond to
 20 the complaint. Plaintiffs’ counsel and Defendants’ predecessor counsel discussed a reasonable
 21 extension, but the latter never reached out to finalize the terms and never sought relief from the
 22 Court. Although there was a delay in Plaintiff’s receipt (and subsequent filing) of the Certificate of
 23 Service from the Central Authority, Temujin Cayman’s response time ran from service on July 7,
 24 2021, not from the filing of proof of service. *See* Rule 4(l)(3) (“Failure to prove service does not
 25 affect the validity of service.”). As confirmed by its previous filings on the record, moreover,
 26 Temujin Cayman **cannot** credibly argue that it somehow lacked actual notice of the complaint and
 27

1 summons. Under these circumstances, it is prejudicial if Temujin Cayman takes even more time to
 2 respond to the complaint only to, once again, challenge service of process.

3 Fourth, Plaintiff's counsel did **not** state that "if Culhane Meadows challenged service, then
 4 he would file a Rule 11 motion." *See* [ECF No. 91-1 ¶ 2]. Rather, Plaintiff's counsel stated that he
 5 believes a service challenge (as to Temujin Cayman) would be frivolous and would not meet the
 6 requirements under Rule 11. For the reasons stated above, Plaintiffs' counsel maintains that belief.
 7 But Plaintiffs' counsel would **never** file a Rule 11 motion without first seeing an adversary's
 8 precise filing with the Court, diligently assessing whether the filing complies with Rule 11, serving
 9 a draft motion under Rule 5, conferring with the adversary as needed, and allowing a 21-day period
 10 for the adversary to withdraw the challenged content. *See* FRCP Rule 11(c). Defendants' counsel
 11 are **wrong** to the extent they are intimating that Plaintiff's counsel threatened to file a Rule 11
 12 motion in bad faith, without due diligence, without following all appropriate procedures, or without
 13 regard for the content of Defendants' forthcoming submissions.

14 Fifth—and to the extent relevant to the Court—Defendants have not fully explained the
 15 procedural posture of the state case. Plaintiff's demurrer, counterclaims, and crossclaims are due
 16 on Monday, October 4, 2021. Before filing demurrers, Plaintiff must meet and confer as to the
 17 substance. On September 29, 2021, Plaintiff's counsel engaged in that process with Defendants'
 18 new counsel. Although Defendants' new counsel participated expeditiously and in good faith, they
 19 were not prepared (and could not have been, given their recent retention) to respond substantively
 20 to most of Plaintiff's grounds for demurrer. Prior to the deadline, therefore, there is not an
 21 opportunity for the meet and confer process to manifest into an amended complaint or into
 22 narrowed grounds for a demurrer. Furthermore, Mr. Abittan's co-defendants in the state case
 23 reached a stipulation to extend their response deadline by 30 days. Under those circumstances,
 24 Plaintiff's counsel requested an equivalent extension—which would permit Defendants' counsel to
 25 familiarize themselves with the operative complaint and Mr. Abittan's grounds for demurrer.
 26 Defendants' counsel ultimately agreed, but they failed to specify to this Court that their own
 27 retention was a significant factor underpinning the requested extension.

1 Finally, Plaintiff respectfully requests a short status conference with the Court to resolve
2 the outstanding issues, including: (a) whether Defendants Ding and Chao should first respond to
3 the Motion for Alternative Service or respond to the Complaint; (b) Temujin Cayman should be
4 permitted to respond to the Complaint out of time, while also challenging service of process; (c)
5 coordinating with the state case to preserve judicial and the parties' resources, without imposing
6 prejudice on any party; and (d) answering any additional questions the Court may have about the
7 procedural posture of the litigation.

8

9

CONCLUSION

10 For the foregoing reasons, Plaintiff respectfully requests a status conference and/or any
11 other relief that the Court deems necessary as to Defendants' Motion for Extension of Time.

12 Dated: October 1, 2021

ROCHE FREEDMAN LLP

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/s/ Constantine P. Economides

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